

**Court of Appeals, State of Michigan**

**ORDER**

People of MI v Danny Grim

Docket No. 258201

LC No. 03-011986 FH

Richard A. Bandstra  
Presiding Judge

Helene N. White

Karen Fort Hood  
Judges

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The Court orders that the motion for reconsideration is GRANTED, and this Court's opinion issued March 14, 2006 is hereby VACATED. A new opinion is attached to this order.



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

JUN 08 2006

Date

*Sandra Schultz Mengel*  
Chief Clerk

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DANNY GRIM,

Defendant-Appellee.

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UNPUBLISHED

March 14, 2006

No. 258201

St. Joseph Circuit Court

LC No. 03-011986-FH

Before: Bandstra, P.J., and White and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for attempted possession of a chemical that he knew or had reason to know was to be used for the purpose of manufacturing methamphetamine, where the violation involved the unlawful generation, treatment, storage, or disposal of a hazardous waste, MCL 333.7407a; MCL 333.7401c(2)(c) (Count I); conspiracy to possess a chemical that he knew or had reason to know was to be used for the purpose of manufacturing methamphetamine, MCL 750.157a; MCL 333.7401c(2)(a) (Count II); and possession of methamphetamine, MCL 333.7403(2)(b)(i) (Count III). Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to concurrent terms of 10 to 20 years (Count I), 6 to 20 years (Count II), and 6 to 20 years (Count III) in prison to be served consecutively to his sentence in a prior case. We reverse defendant's conviction, vacate his sentence, and remand for a new trial on Count I. We affirm defendant's convictions for Counts II and III, but vacate his sentences and remand for the preparation of a sentencing information report and resentencing on those counts.

We initially note that, although the charging information indicates that defendant was charged with Count I under MCL 333.7401c(2)(c) and Count II under MCL 333.7401c(2)(a), these sections of the statute provide the sentences which can be imposed for a violation of MCL 333.7401c(1)(b), which prohibits a person from owning or possessing "any chemical or any laboratory equipment that he or she knows or has reason to know is to be used for the purpose of manufacturing a controlled substance in violation of section 7401 . . . ." MCL 333.7401c(2)(a) provides for a maximum sentence of ten years in prison, while MCL 333.7401c(2)(c) provides for a maximum sentence of 20 years in prison "[i]f the violation involves the unlawful generation, treatment, storage, or disposal of a hazardous waste."

Defendant first argues that there was insufficient evidence to sustain his conviction for Count I. We disagree. We review de novo challenges to the sufficiency of the evidence in a

criminal trial to determine whether, when the evidence is viewed in the light most favorable to the prosecutor, a rational trier of fact could have found all the elements of the charged crime to have been proved beyond a reasonable doubt. *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002). To sustain a conviction for defendant under MCL 333.7407a and MCL 333.7401c(2)(c), the prosecutor was required to prove that defendant attempted to possess anhydrous ammonia and knew or had reason to know that it was to be used for the purpose of manufacturing methamphetamine, and that the violation involved the unlawful generation, treatment, storage, or disposal of a hazardous waste.

Defendant does not challenge his conviction for attempting to possess anhydrous ammonia as provided under MCL 333.7401c(1)(b). Rather, defendant challenges his conviction under the aggravated circumstance of the violation involving the unlawful generation, treatment, storage, or disposal of a hazardous waste described in MCL 333.7401c(2)(c). Defendant argues that MCL 333.7401c(2)(c) is inapplicable because an attempt does not involve the actual generation, treatment, storage, or disposal of a hazardous waste. However, under MCL 333.7407a, an attempt is punishable by the penalty for the crime the person attempted to commit. Thus, where the sentence for a conviction of MCL 333.7401c(1)(b) can be increased under the aggravating factors set out in MCL 333.7401c(2)(c), the sentence for a conviction of the attempted possession of anhydrous ammonia is also punishable under that enhanced sentence provision.

Defendant further argues that his conviction under MCL 333.7401c(2)(c) was improper because anhydrous ammonia is not properly classified as a hazardous waste as defined in MCL 324.11103(3):

“Hazardous waste” means waste or a combination of waste and other discarded material including solid, liquid, semisolid, or contained gaseous material that because of its quantity, quality, concentration, or physical, chemical, or infectious characteristics may cause or significantly contribute to an increase in mortality or an increase in serious irreversible illness or serious incapacitating but reversible illness, or may post a substantial present or potential hazard to human health or the environment if improperly treated, stored, transported, disposed of, or otherwise managed.

At trial, evidence was presented that defendant made preparations to siphon anhydrous ammonia into a propane tank not designed for such storage, for the purpose of transporting it to a different location for use in manufacturing methamphetamine. A police officer offered extensive testimony concerning the manufacture of methamphetamine and the role of anhydrous ammonia in that process. The officer opined that anhydrous ammonia taken for the purpose of using it to manufacture methamphetamine constituted hazardous waste. Specifically, the officer testified that anhydrous ammonia is poisonous, flammable, toxic, corrosive, abrasive to the skin, and can cause life threatening lung and tissue damage; that if anhydrous ammonia is loose in a building, he must wear a respirator mask, plastic suit, and gloves so that he is completely protected from exposure; that when anhydrous ammonia is used to make methamphetamine, explosions sometimes occur during the process; and that anhydrous ammonia is listed on a chart from the National Drug Intelligence Center as one of several hazardous components or chemicals found in methamphetamine. The officer explained that the terms hazardous material and hazardous waste

are interconnected, and that term usage is a matter of packaging and care. That is, hazardous materials become hazardous waste when they are handled or disposed of in an improper fashion.

While anhydrous ammonia is not itself a hazardous waste under the definition set out in MCL 324.11103(3), conviction under MCL 333.7401c(2)(c) only requires proof that the violation involve the unlawful generation, treatment, storage, or disposal of a hazardous waste, and does not require that the chemical possessed or attempted to be possessed be classified as a hazardous waste. Defendant apparently concedes that the use of anhydrous ammonia to manufacture methamphetamine involves the generation of a hazardous waste, and the officer's testimony regarding the properties of anhydrous ammonia and the precautionary measures which need to be taken when cleaning up after methamphetamine has been manufactured with anhydrous ammonia supports a conclusion that defendant's attempted possession of anhydrous ammonia for the purpose of manufacturing methamphetamine involved the unlawful generation of hazardous waste as contemplated by MCL 333.7401c(2)(c).

The remaining issue is whether the possession of anhydrous ammonia involves the unlawful generation, treatment, storage, or disposal of hazardous waste. We may consult dictionary definitions of terms that are not defined in a statute. *People v Perkins*, 473 Mich 626, 639; 703 NW2d 448 (2005). *Random House Webster's College Dictionary* defines "possess" as "to have as belonging to one . . ." and "involve" as "to include as a necessary circumstance, condition, or consequence . . ." Thus, the unlawful generation, treatment, storage, or disposal of a hazardous waste is "a necessary circumstance, condition, or consequence" of the possession of anhydrous ammonia.

The language of MCL 333.7401c(1)(b) supports a conclusion that the possession of anhydrous ammonia involves the unlawful generation, treatment, storage, or disposal of a hazardous waste, because it contains the requirement that a person know or have reason to know that the chemical possessed is to be used for the purpose of manufacturing methamphetamine. Because the use of anhydrous ammonia in the methamphetamine manufacturing process is a known, necessary consequence of its possession, sufficient evidence existed from which a rational trier of fact could conclude that defendant's attempted possession of anhydrous ammonia involved the unlawful generation of a hazardous waste.

Defendant next argues that the trial court erroneously instructed the jury on Count I. We agree. We review an unpreserved issue regarding jury instructions for plain error. *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003). We review jury instructions in their entirety to determine whether there is error requiring reversal, and "will not reverse a conviction if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Id.*

Defendant raises several claims of error regarding the jury instructions given on Count I, the attempted possession charge. To provide context for that claim, we initially note that the prosecutor inaccurately described that charge to the jury throughout the trial. In his opening statement, the prosecutor described the charge to the jury as "attempted possession of methamphetamine precursor chemical . . . it's a hazard that in fact it's a hazardous material." The prosecutor further stated that defendant "didn't actually possess the hazardous material, anhydrous ammonia. It's only an attempt"; that defendant "must intend to possess it, and that chemical must be used to make methamphetamine"; and that defendant "must have known that it

was for the purpose of making anhydrous ammonia, and he must have known that he was attempting to possess it. And we have to prove that it's a hazardous chemical."

The prosecutor's description of his burden of proof does not accurately reflect the crime charged; he was not required to prove that the anhydrous ammonia was a hazardous chemical or a hazardous material. MCL 333.7401c provides in pertinent part:

(1) A person shall not do any of the following:

(b) Own or possess any chemical or any laboratory equipment that he or she knows or has reason to know is to be used for the purpose of manufacturing a controlled substance in violation of section 7401 . . . .

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(2) A person who violates this section is guilty of a felony punishable as follows:

(a) Except as provided in subdivisions (b) to (f), by imprisonment for not more than 10 years or a fine of not more than \$100,000.00, or both.

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(c) If the violation involves the unlawful generation, treatment, storage, or disposal of a hazardous waste, by imprisonment for not more than 20 years or a fine of not more than \$100,000.00, or both.

The use of the phrase "methamphetamine precursor chemical" by the prosecutor (and, as quoted below, by the trial court) also causes concern. The statute requires that a person "knows or has reason to know" that the chemical is to be used for the purpose of manufacturing methamphetamine. The effect of modifying the term "chemical" with "methamphetamine precursor," is a conclusive statement suggestive of that knowledge, the very thing that must be proved.

The trial court gave the following instructions regarding Count I, the attempt charge:

The defendant is charged with attempting to commit the crime of [possession of] a methamphetamine precursor chemical involving unlawful storage, disposal, or disposal [sic] of hazardous waste.

To prove defendant's guilt, the prosecutor must prove each of the following elements beyond a reasonable doubt:

First, that the defendant intended to commit the crime of possession of methamphetamine precursor chemicals involving the unlawful storage or disposal of hazardous waste, which is defined as anhydrous ammonia.

Second, the defendant took some action toward committing the alleged crime but failed to complete the crime. It is not enough to prove that the defendant made preparations for committing the crime. Things like planning a crime or arranging

how it would be committed are just preparations, and they do not qualify as an attempt. In order to qualify as an attempt, the action must go beyond preparation to the point where the crime would have been completed if it hadn't been interrupted by outside circumstances.

The attempt instruction given by the trial court was incorrect. CJI2d 9.1 states, in pertinent part:

(1) The defendant is charged with attempting to commit the crime of \_\_\_\_\_. To prove the defendant's guilt, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant intended to commit \_\_\_\_\_, which is defined as [*state elements from the appropriate instructions defining the crime*]. [Emphasis in original.]

In reading the attempt instruction, the trial court stated, "which is defined as anhydrous ammonia," instead of stating the elements from the appropriate instructions defining the crime. Had the trial court modified "methamphetamine precursor chemical" with the phrase "which is defined as anhydrous ammonia," the elements of the crime may have been more clear to the jury. However, as the instruction reads, "which is defined as anhydrous ammonia" operates to modify "hazardous waste."

Additionally, the statutory definition of "hazardous waste" under MCL 324.11103 was never presented to the jury. We find this significant because, had the jury been provided with a separate definition of hazardous waste, it would have been able to ascertain whether anhydrous ammonia fell under that definition. On the other hand, we find it equally likely that the jury would assume that "anhydrous ammonia" fell under the definition of hazardous waste, given the wording of the attempt instruction. However, given the prosecutor's description of the crime charged during his opening statement, we find that a reasonable juror could have believed that the trial court's statement indicated that "hazardous waste" was defined as "anhydrous ammonia."

We find further support for this conclusion in the trial court's instruction on specific intent. The trial court instructed the jury as follows:

The crime of attempt to possess hazardous methamphetamine precursor chemicals and conspiracy to possess such materials requires proof of specific intent. This means that the prosecution must prove not only [that] the defendant did certain acts, but that he did those acts with the intent to cause a particular result.

Defendant argues that the trial court erred when it gave this instruction, and when, following its instructions, it described the verdict form to the jury, because it described the crime in both instances as the "attempt to possess hazardous methamphetamine precursor chemicals." We find that the specific intent instruction incorrectly described the offense and misled the jury, because the statute did not require the jury to determine whether the "methamphetamine precursor chemicals" were simply hazardous (i.e., dangerous) in order to convict defendant. "A judge's incorrect recitation of the law undermines the purpose of jury instructions." *People v*

*Butler*, 413 Mich 377, 387; 319 NW2d 540 (1982). As previously noted, the final element required to convict defendant under MCL 333.7401c(2)(c) required proof that the violation “involves the unlawful generation, treatment, storage, or disposal of a hazardous waste.” The attempt and specific intent instructions were misleading and confusing, and effectively decided that element for the jury.

In light of the prosecutor’s description of the attempted possession charge at the beginning of trial, and the trial court’s repeated description of the charge as the “attempt to possess hazardous methamphetamine precursor chemicals,” we find that the jury was likely to believe that anhydrous ammonia, as a “hazardous methamphetamine precursor chemical,” was a hazardous waste as stated in the final element of the crime charged. The descriptions used by the prosecutor and by the trial court were incorrect statements of the law and reflect a misunderstanding of the elements required to convict defendant of the crime charged. This constitutes plain error.

The trial court went on to recite the correct instruction:

The defendant is charged with the crime of attempting to knowingly or intentionally possess a chemical that he knows or has reason to know is to be used for the purpose of manufacturing a controlled substance, to wit, methamphetamine, which involves the storage or disposal of a hazardous waste.

To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

First of all, that he attempted to possess the chemical.

Second, that the chemical be used for the [] manufacturing of methamphetamine, a controlled substance.

And third, that the defendant knew or had reason to know that the chemical he was attempting to possess would be used for the purpose of manufacturing methamphetamine.

Fourth, that the defendant knew he was attempting to possess said chemical.

And fifth, the violation must involve the generation, treatment, storage or disposal of a hazardous waste.

However, this Court follows the presumption that in situations where both a correct and an incorrect instruction are given, the jury followed the incorrect instruction. *People v Hess*, 214 Mich App 33, 37; 543 NW2d 332 (1995). But this Court will not find error if somewhat imperfect instructions fairly presented the issues to be tried and sufficiently protected the defendant’s rights. *People v Davis*, 216 Mich App 47, 54; 549 NW2d 1 (1996), quoting *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). Here, the elements of the crime were improperly presented to the jury in a misleading and confusing manner; that is, the jury instructions did not fairly present the issues to be tried and did not sufficiently protect defendant’s rights. This plain error in the jury instructions affected defendant’s substantial

rights. The jury instructions effectively decided the final element of the charge for the jury. Proof of this element allowed defendant to be convicted under MCL 333.7401c(2)(c), which provides for a 20 year maximum sentence, instead of under MCL 333.7401c(1)(b), which is punishable by only a ten year maximum sentence under MCL 333.7401c(2)(a). Therefore, the jury instructions given affected the outcome of the trial. We reverse defendant's conviction for Count I, vacate his sentence, and remand for a new trial.

We note that reversing defendant's conviction and vacating his sentence for Count I raises an issue regarding defendant's remaining sentences. Defendant was also convicted of conspiracy to possess a chemical that he knew or had reason to know was to be used for the purpose of manufacturing methamphetamine, MCL 750.157a; MCL 333.7401c(1)(b); MCL 333.7401c(2)(a) (Count II), and possession of methamphetamine, MCL 333.7403(2)(b)(i) (Count III). The legislative sentencing guidelines apply to drug-related offenses, including all three of defendant's convictions. *People v Hendrick*, 472 Mich 555, 557; 697 NW2d 511 (2005); MCL 777.13m; MCL 769.34(2). Under the sentencing guidelines act, a court must impose a sentence in accordance with the appropriate sentence range. *People v Hegwood*, 465 Mich 432, 438-439; 636 NW2d 127 (2001). A court may depart from the recommended sentence range if it states substantial and compelling reasons for the departure on the record. *People v Babcock*, 469 Mich 247, 255-256; 666 NW2d 231 (2003); MCL 769.34(3).

While a sentencing information report and accompanying sentence range need only be prepared for the highest crime class felony conviction when multiple concurrent convictions are at issue, all sentences must still adhere to the principle of proportionality. *People v Mack*, 265 Mich App 122, 127-129; 695 NW2d 342 (2005); MCL 777.14(2)(e)(ii) and (iii).<sup>1</sup> Here, the probation department only prepared a sentencing information report for Count I, because it is a Class B crime and is in a higher crime class than defendant's other two convictions, which are Class D crimes.

The statutory maximum punishment is 20 years for Count I, and ten years for Counts II and III. MCL 777.13m; MCL 333.7401c(2)(a); MCL 333.7401c(2)(c). For Count I, defendant was scored 105 prior record variable points and zero offense variable points, resulting in a PRV level F and an OV level I for a minimum sentencing guidelines range, as a fourth-offense habitual offender, of 72 to 240 months (6 to 20 years). Had defendant been scored in the Class D grid for Counts II and III, his PRV and OV scores would have translated to a minimum sentencing guidelines range, as a fourth-offense habitual offender, of 10 to 46 months. The trial court sentenced defendant to concurrent terms of 10 to 20 years for Count I, and 6 to 20 years (72 to 240 months) each for Counts II and III. This was an upward departure from the applicable sentencing guidelines range of 10 to 46 months for the Class D offenses. MCL 769.34(10).

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<sup>1</sup> In *People v Johnigan*, 265 Mich App 463, 470-472; 696 NW2d 724 (2005), Judge Sawyer called into question the pertinent holding from *Mack*, *supra* at 127-129, that the sentencing guidelines are not applicable to lower class concurrent convictions and that all sentences must merely adhere to the principle of proportionality. *Johnigan* provides that under MCL 777.21(2) ("If the defendant was convicted of multiple offenses, subject to section 14 of chapter IX [MCL 769.14, which is inapplicable here], score each offense as provided in this part."), the trial court is required to score the sentencing guidelines for all offenses.

Because the trial court failed to state on the record any of its reasons for imposing a sentence outside of the applicable guidelines range for Counts II and III, we vacate defendant's sentences and remand for preparation of a sentencing information report and resentencing for Counts II and III.

Defendant next argues that he was denied the effective assistance of counsel where defense counsel failed to object to the above-contested jury instructions and failed to request proper instructions on the definition of hazardous waste. To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Defendant must further demonstrate a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair and unreliable. *Id.*

The jury instructions given for Count I constituted plain error that affected defendant's substantial rights. Consequently, defense counsel's failure to object to the jury instructions indicates that his performance fell below an objective standard of reasonableness. Further, because the jury instructions were worded in a misleading and confusing manner and improperly aided the jury in convicting defendant by proving an element of the crime charged, there is a reasonable probability that, but for counsel's failure to object, the result of the proceedings would have been different. The attendant proceedings were rendered fundamentally unfair, and defendant was denied the effective assistance of counsel.

Because defendant is entitled to a new trial on Count I, we decline to address his prosecutorial misconduct arguments with respect to that Count. However, because defendant's evidentiary issues may arise on retrial, we will address them.

Defendant argues that the trial court erred in admitting excerpts of his recorded telephone calls made from jail. We review for an abuse of discretion a trial court's decision to admit evidence. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). However, we review de novo preliminary questions of law such as decisions regarding the admission of evidence, e.g., whether a rule of evidence precludes admissibility of the evidence. *Id.* It is an abuse of discretion to admit evidence that is inadmissible as a matter of law. *Id.*

Defendant argues that the recordings were not properly authenticated. MRE 901(b)(6) provides the following illustration of proper authentication of telephone calls:

Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called . . . .

Although defendant argues that an individual with the same first name was incarcerated at the jail while he was lodged there, defendant admitted at trial to making telephone calls from jail and talking to three people. Additionally, a police officer testified that the phone number of the mother of one of the co-defendants was called from two different cells to which defendant was assigned at the jail. Therefore, sufficient evidence existed to authenticate the recorded telephone calls.

Defendant also contends that because the recorded calls were edited by the police in anticipation of litigation, they are inadmissible. Because defendant objected at trial on grounds other than those raised on appeal, this issue is unpreserved, MRE 103(a)(1); *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999), and is reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

In support of his argument, defendant cites *People v McDaniel*, 469 Mich 409, 412-414; 670 NW2d 659 (2003), in which our Supreme Court held that a police laboratory report constituted inadmissible hearsay under the business records exception because it established an element of the crime that defendant was charged with, was made in an adversarial setting, and its trustworthiness was undermined because it was prepared in anticipation of litigation. Here, the record demonstrates that the phone calls at issue were not recorded in anticipation of litigation; recording of calls made by inmates was an activity that was regularly conducted in the course of business. However, it is undisputed that the phone calls were edited in anticipation of litigation. Nonetheless, the record clearly shows that the recorded conversations were redacted to limit the material to that which was relevant to prove the crimes charged, and to refrain from exposing the jury to any material that would be deemed irrelevant or prejudicial to defendant. Therefore, defendant has not demonstrated that the admission of the excerpts of the recorded telephone conversations constituted plain error.

Defendant next argues that the prosecutor failed to present any of the speakers on the recorded telephone conversations to allow defendant to cross-examine them at trial. In support of his contention, defendant cites *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004), in which the United States Supreme Court held that for testimonial evidence to be admissible against a defendant, the declarant must be unavailable and the defendant must have had "a prior opportunity for cross-examination" of the declarant. However, *Crawford* is inapplicable because it concerns testimonial evidence, whereas the contested evidence at issue here is non-testimonial, i.e., the statements were made in conversations with defendant, which were recorded because they occurred while he was incarcerated. Moreover, the recorded telephone conversations were properly admissible.

We reverse defendant's conviction, vacate his sentence, and remand for a new trial on Count I. We affirm defendant's convictions for Counts II and III, but vacate his sentences and remand for the preparation of a sentencing information report and resentencing on those counts. We do not retain jurisdiction.

/s/ Richard A. Bandstra  
/s/ Helene N. White  
/s/ Karen M. Fort Hood